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No. 10-136

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

ROBERT HOREL, WARDEN

Petitioner,

v.

FELIX SOLORIO VALDOVINOS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES
FROM UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED FOR REVIEW

Whether this Court should review a Ninth Circuit Opinion based upon the Attorney General's inaccurate claim that the Ninth Circuit employed the wrong standard of review, when in fact the Ninth Circuit specifically employed the deferential standard of review required under the Antiterrorism and Effective Death Penalty Act (hereafter referred to as "AEDPA").

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MISCELLANEOUS

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II. OPINION BELOW

The opinion of the court of appeals (App. 1a)[1] is reported at 598 F.3d 568 (9th Cir. 2010)

III. JURISDICTION

This Court has jurisdiction under 28 U.S.C § 1254(1).

IV. STATEMENT OF CASE

Felix Valdovinos was convicted of murder and sentenced to fifty years to life based upon unnecessarily unreliable in-court identifications and the prior, out-of court testimony of Aurelio Lopez, a man with a motive to pin the blame on Valdovinos.

The government had no forensic evidence connecting Valdovinos to the crime and Valdovinos has always maintained he is innocent. The State has repeatedly suppressed exculpatory evidence which is inconsistent with its theory of the case; and when that suppression has been discovered, the State has repeatedly sought to minimize its errors. That minimization continues in this Court where the Attorney General claims that despite the numerous and undisputed failures to disclose exculpatory evidence there was no reasonable doubt that Valdovinos was the killer (Attorney General's Petition for Writ of Certiorari [hereafter "AG"] 23).

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[1] For ease of reference we will cite to the Attorney General's Appendix to Petition for Writ of Certiorari as App. __a.

The Attorney General is wrong. There is much more than a reasonable doubt that Valdovinos was the killer. The State had a letter indicating that Valdovinos did not do the crime and the crime was a drug murder. The State did not disclose that letter. The State knew its witnesses were shown photo lineups and did not pick out Valdovinos as the killer. The State did not disclose those photo lineups in time for them to be used. The State claimed the identification of Valdovinos was powerful, because "only [Valdovinos] was wearing a cowboy hat, as the killer was"[2] wearing a cowboy hat. The State did not disclose it had pictures of other men at the bar wearing cowboy hats. The State knew that when its witness Aurelio Lopez was arrested, he was on probation and in possession of a gun and more than on ounce of methamphetamine. The State did not disclose that information until after Lopez testified at a preliminary hearing. The State simply released Lopez and did not tell the defense that the State had decided not to charge Lopez with possession of the gun, the drugs or even violate his probation. Lopez did not testify at the trial and his preliminary was not read to the jury.

No rational person would share the State's view of the evidence as powerful. There was no forensic evidence connecting Valdovinos to the murder, and eyewitnesses who were shown two separate photo line-ups did not select Valdovinos as the shooter. Only later, when Valdovinos was being brought to

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[2] Attorney General Brief in the California Court of Appeal at 23.

court in a jail jumpsuit and shackles, was Valdovinos (mis)identified as the shooter. These unnecessarily unreliable identifications occurred only because the prosecution withheld important exculpatory evidence, the prior failures of the witnesses to identify Valdovinos in the photo lineups.

The state court of appeal found the identifications in this case reliable because it erroneously believed that of all the people at the scene of the crime, only Valdovinos "was consistently identified as wearing a cowboy hat." App. 99a. We now know there was nothing unique about Valdovinos' head gear because the prosecution file contained a picture of another man at the bar where the shooting occurred wearing a black cowboy hat on the evening of the shooting, but the prosecution failed to disclose that picture to the defense.

We now know that Aurelio Lopez, who was the only witness that knew Valdovinos prior to the shooting, was arrested in possession of a gun and drugs just before he told the police Valdovinos had a gun. We also know that the prosecution did not charge Lopez with those crimes, violate his probation, or serve him with a subpoena to secure his presence at trial. The prosecution also failed to provide the information about the gun and the drugs and the failure to file charges to the defense in time for that information to be used to cross-examine Lopez.

We now know that Lopez admitted to Juan Ledezma that he had done the shooting and had placed the blame on Valdovinos. See e.g. App. 111a.

We now know that the police possessed a letter indicating that the murder was a contract killing involving drugs, a theory inconsistent with the prosecution's theory of the case. This letter directly impeached prosecution witness testimony that there was no evidence connecting the murder to drugs. The prosecution did not disclose that letter to the defense – just as it failed to turn over the evidence of the attempted, but unsuccessful, identifications; evidence of the guns and drugs possessed by its star witness; and the photos of other bar patrons dressed in the same fashion that the shooter was described as being dressed.

Singly and together, these multiple failures to disclose exculpatory information undermine confidence in the conviction in this case. Because the state court's affirmation of that conviction was based upon an unreasonable application of settled federal law, the panel decision was correct and we request this Court deny the Attorney General's Petition for Writ of Certiorari.

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IV. THE PANEL OPINION APPLIED A DEFERENTIAL STANDARD OF REVIEW AND DID NOT REVIEW THE CALIFORNIA SUPREME COURT'S DECISION USING A *DE NOVO* STANDARD.

The Attorney General argues that this Court should grant its Petition for a Writ of Certiorari because: "[f]irst the court of appeals here granted the writ by conducting *de novo* review of a claim the California Supreme Court had summarily denied. Second, Valdovinos' claim would have to be rejected under a deferential review." AG 10.

The Attorney General is wrong on both points. First, the court of appeals did not conduct a *de novo* review of a claim the California Supreme Court had summarily denied. Second, assuming arguendo, the court of appeals applied a *de novo* standard, and it did not, as the court of appeals found, Valdovinos should prevail under a deferential review.

Apparently, the Attorney General[3] has forgotten the clear statement of Judge Kleinfeld at oral argument: "I would find this a lot easier to reverse on Brady grounds if it was a direct appeal, but it's AEDPA deference which really concerns me." [http://www.ca9.uscourts.gov/datastore/media/2009/09/01/08-15918.wma at 46 secs.]

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[3] The same Attorney General who signed the Petition in this case argued the case before the Ninth Circuit.

The Ninth Circuit panel opinion specifically relied upon "the standard set forth in AEDPA" (App. 14a) and specifically noted that, "[t]he question under AEDPA is not whether a federal court believes the state court's determination was incorrect, but whether that determination was unreasonable—a substantially higher threshold." App. 14a.

While the panel opinion never indicates that it was applying a *de novo* standard to the California Supreme Court's summary denial, and the language cited above demonstrates that it did not, the panel stated, correctly, that it reviewed the district court's denial of habeas relief *de novo*. The Attorney General's attempt to expand the panel's discussion about the standard of review it used to examine the federal district court's opinion to imply that the panel used the same standard of review to examine the California Supreme Court's decision is simply not supported by the language of the panel opinion, and in fact is contradicted by the language of the panel opinion, and is not a reason this Court should grant the Petition.

V. UNDER ANY STANDARD OF REVIEW THE BRADY ERRORS IN THIS CASE WERE SUBSTANTIAL AND UNDERMINE CONFIDENCE IN THE VERDICT

Moreover, under any standard, including the deferential one employed by the panel in this case, the State's repeated and serious Brady violations "undermine[s] confidence in the outcome of the trial." App. 16a, panel opinion quoting Kyles v. Whitley, 514 U.S. 419, 436-37 (1995).

Just as the Attorney General has unreasonably stretched language of the panel opinion to support its claim that a *de novo* standard of review was applied, it has also stretched the underlying facts in its attempt to minimize the devastating effect of the repeated and acknowledged Brady errors in this case. The Attorney General is now attempting to convince this Court to grant its Petition based upon a highly partisan and misleading description of facts. That description demonstrates that the State still does not understand its Brady obligations and this Court should not encourage such reckless claims by granting the requested Petition.

VI. THE FAILURE TO DISCLOSE A LETTER DESCRIBING THE KILLING AS A CONTRACT DRUG MURDER, WHICH POINTED TO THE CULPABILITY OF A THIRD PARTY, ALLOWED THE STATE TO FALSELY ARGUE THAT THE KILLING HAD NO RELATION TO DRUGS

The State's narrow interpretation of its Brady obligations continues before this Court; and depends upon the assumption of facts, which have no support in the record, that: "Valdovinos himself was the writer of the letter or Valdovinos directed the letter to be written in his name." AG 16.

Under the Attorney General's argument, there could never be a reversal for failure to disclose Brady information, as long as there was a theory, no matter how preposterous, that under some theoretical set of facts, not supported by the record, the undisclosed material might not be exculpatory.

Even if the letter was not directly exculpatory, and it was, or even if the letter was preposterously written by Valdovinos, however, the letter still directly impeached the testimony of the investigating Officer Alcantar, who testified that the police had no evidence whatsoever that drugs were behind the murder. ER 471[4].

The defense theory was that Valdovinos is innocent. The murder was a drug murder unrelated to Valdovinos. The prosecution had a letter that bolstered the defense theory and directly contradicted prosecution testimony that the murder had nothing to do with drugs. Instead of turning that material over, as required by Brady, the prosecution buried the letter and allowed its witnesses to falsely claim that the prosecution had no evidence that this was a drug-related murder. After the defense cross-examined Alcantar about the belatedly discovered gun and drugs possessed by Lopez, and sought to characterize the murder as drug-related, the prosecution sought to undermine the defense, by asking Alcantar: "Up until today is there any evidence whatsoever that drugs were behind the murder?" ER 471; see also ER 473. Alcantar answered: "No." The prosecutor continued: "Do you have any information that you haven't or that we haven't shown the jury as to a motive to this case for the killing, in other words, there's something hidden other than just what appears to be a spur of the moment random –"; and again Alcantar

[4] We will cite to the Excerpt of Record filed in the Ninth Circuit, as the Attorney General has done, as ER __

responded: "Nothing else. Nothing that I am aware of." ER 471. The failure to provide the letter bolstered the prosecution's case and allowed Alcantar to testify falsely without fear of impeachment. If the prosecution had not believed that it was important to undermine the defense theory that this was a drug killing, the prosecution would not have had its investigating officer undermine that theory. That undermining, however, occurred through Alcantar's testimony, which we now know was false. The letter was Brady information and the State's failure to turn it over undermines confidence in the verdict.

VII. THE FAILURE TO DISCLOSE A PHOTOGRAPH OF MAN IN A HAT SIMILAR TO THE HAT CONNECTED TO THE SHOOTER UNDERMINES CONFIDENCE IN THE VERDICT

The Attorney General then claims: "Valdovinos never established that the prosecution failed to disclose the Mongia photograph or that defense counsel at the time of trial was unaware of Mongia's involvement in the case." AG 15. This claim is also belied by the record. The Attorney General argued to the State Court of Appeal: "only [Valdovinos] was wearing a cowboy hat, as the killer was." Attorney General Brief in the California Court of Appeal at 43. One of the reasons the state court of appeal excused the prosecution's numerous errors was that it found "only [Valdovinos] was consistently identified as wearing a cowboy hat." App. 99a. Unlike the Attorney General's claims, the record is clear. The prosecution failed to disclose the Mongia photograph.

The Attorney General goes on to argue, consistent with what we now know, but inconsistent with what the State disclosed at the time of the trial, and inconsistent with its argument to the state court of appeal, that the cowboy hat was not an important feature of the (mis)identification because "the shooter was not the only person wearing a cowboy hat at the scene;" and "that regardless of whether a cowboy hat was a 'stand-out characteristic[] of the shooter,' that characteristic had no significant effect on any of the eyewitness identifications." AG 15. As demonstrated above, both the Attorney General and the state court of appeals specifically relied on Valdovinos' unique head covering to support the identification in this case. The suppression of the photograph of another man wearing a cowboy hat undermines confidence in the verdict in this case and should make this Court look with skepticism on all of the Attorney General's claims.

VIII. THE PROSECUTION'S FAILURE TO DISCLOSE THE PHOTO LINEUPS IN WHICH VALDOVINOS WAS NOT IDENTIFIED, DESPITE BEING THE ONLY PERSON WHOSE PHOTOGRAPH WAS REPEATED, UNDERMINES CONFIDENCE IN THE VERDICT

The Attorney General claims, "the court of appeals mistakenly evaluated this belatedly disclosed evidence as if it had never been disclosed." AG 18. The Attorney General also claims that, "the belated disclosure may actually have helped Valdovinos." AG 19. Again, the Attorney General's argument is not based on the record or the Ninth Circuit opinion which specifically describes the belated

disclosed exculpatory photo lineups as "suppressed evidence revealed during trial." App. 19a.

The failure to disclose the prior attempted photographic line-ups in a timely fashion led directly to unnecessarily suggestive in-court show-ups at the preliminary hearing and at trial. Those (mis)identifications of Valdovinos at trial and at the preliminary hearing were undoubtedly affected by their repeated exposure to Valdovinos' photographs at the photo line-ups and to his repeated physical presence at the preliminary hearing and trial. The late disclosure prevented any opportunity for an independent line-up, or even cross-examination, to check specific recollections at a blackboard preliminary hearing. The late disclosure of the repeated photo line-ups removed any chance of a non-suggestive identification process and led to an unnecessarily suggestive identification process. The claim by the Attorney General that this information was received in time to be useful, and that the belated disclosure of the unsuccessful lineups somehow operated to Valdovinos' advantage mischaracterizes both the record below and the panel opinion.

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IX. THE LATE DISCLOSURE OF THE GUNS AND DRUGS, AND THE STATE'S FAILURE TO FILE CHARGES BASED UPON THOSE FINDINGS AGAINST ITS MOST IMPORTANT WITNESS, UNDERMINES CONFIDENCE IN THE VERDICT.

Unlike all of the other identification witnesses, Lopez was the only person who had known Valdovinos before that evening. There is a huge difference between stranger identification and recognition of a previously known person. At the only opportunity to cross-examine Lopez, at the preliminary hearing, the prosecution failed to disclose the guns and drugs found with Lopez or even his probationary status. Lopez did not appear at trial and his preliminary hearing testimony was read to the jury.[5]

Again the Attorney General ignores the panel's description of this material as "suppressed evidence revealed during trial" (App. 19a), claims the court of appeals evaluated this evidence as if it "was never disclosed;" and goes on to argue that the belated disclosure of the guns and drugs found when Lopez was arrested and the State's decision not to file charges based upon that evidence "did not prejudice the defense." AG 21.

The Attorney General's argument ignores the benefit that Lopez received for his statement and testimony: a get out of jail free card on the new drug and gun charges and a restoration of probation on older charges. Because the defense did

[5] Counsel argued below that this use of preliminary hearing testimony violated Crawford v. Washington, 541 U.S. 36 (2007) and only occurred as a result of ineffective trial counsel's failure to object.

not find out about the new drugs and gun until after the State had released Lopez, the defense was never able to use this information to cross-examine and impeach Lopez. As the panel found, the suppression of this exculpatory evidence was highly relevant to an analysis of the prejudice from the multiple failures to disclose exculpatory evidence.

X. THIS CASE WILL NOT BE AFFECTED BY HARRINGTON V. RICHTER

The Attorney General's primary argument is that this Court should grant review because the issue of whether AEDPA deference applies to a summary denial by the California Supreme Court is pending before this Court; and that if this Court decides AEDPA deference apples to a summary denial, the panel should be reversed because it did not defer to the California Supreme Court. This argument is disingenuous, at best. As indicated above, the panel specifically relied upon "the standard set forth in AEDPA" (App. 14a) and specifically noted that, "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect, but whether that determination was unreasonable—a substantially higher threshold." App. 14a. Apart from the language in the opinion itself, at oral argument, Judge Kleinfeld specifically acknowledged the difference in the standards of review on direct appeal and on habeas. Moreover, Judge Kleinfeld specifically signed the dissent in Richter v.

Hickman, 578 F. 3d 944 (9th Cir. 2009) (en banc) which argued that insufficient deference was given the State Court opinion.

The panel here gave deference to the State Court opinion. That deference, however, was overcome by the undisputed facts some of which were not discovered until after the last reasoned State Court opinion.

XI. CONCLUSION

This case is a classic example of a flawed process leading to a bad outcome. The prosecution hid exculpatory evidence so the defense could not use that evidence to cross-examine witnesses at the preliminary hearing. The undisclosed favors that the prosecution gave to the main witness led to the failure of that witness to appear at trial and the inability of the defense to cross-examine that witness regarding his out-of-court statements to the police. The hiding of other evidence led to additional corruption of the memories of the witnesses and led to a misidentification in court. The prosecution also failed to disclose a letter indicating the killing was a contract killing involving drugs and allowed prosecution witnesses to testify that the killing was random and not connected to drugs. The failure to disclose a picture of another bar patron dressed in a black hat, created a false impression that Valdovinos' headwear was somehow unique when in fact it was typical of the patrons at the bar where the shooting occurred. If the prosecution had acted within the bounds of the law and disclosed the evidence as

required by the Constitution, it is possible an investigation may have turned up the real shooter. After all, the police had resources and a letter telling them who had paid for the killing. Instead, the prosecution focused on making a case against Valdovinos; and with questionable identification procedures, and misleading trial tactics secured a conviction.

The misleading tactics by the State have continued in its Petition. The Attorney General claims the panel opinion did not did apply a deferential standard of review. The panel opinion clearly states it applied the deferential standard required under AEDPA. The Attorney General claims the picture of another man wearing a cowboy hat was not suppressed. Yet the Attorney General argued to the state court of appeal, that "only [Valdovinos] was wearing a cowboy hat, as the killer was." Attorney General Brief in the California Court of Appeal at 43. Finally, the Attorney General ignores the language of the panel opinion describing some of the evidence as revealed during trial, and claims the court of appeal evaluated that evidence as if it was never disclosed.[6] The Attorney General's Petition is not based on the facts as found by any of the courts below and its rendition of the "facts" is specifically contradicted by arguments it made in the lower courts.

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[6] In fact the guns and the drugs were not disclosed in time to use to cross examine the absent Lopez.

This conviction was the result of a complete denial of due process and a misleading of the trier of fact. That misleading description of the facts has continued in the Attorney General's Petition. Granting the requested Petition will only encourage the State to continue to mislead. We respectfully request the Attorney General's Petition be denied.

Respectfully submitted,

Christopher J. Cannon
Attorney for Respondent Felix Valdovinos